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INTRODUCTION

The responsibility of an agency, bureau, or commission director is to exercise his or her best judgment in the identification, categorization, and communication, including the method and frequency, of legal risks. The notification of legal risks in accordance with these procedures does not substitute consultation with the Department of Attorney General (AG).

PURPOSE

To help identify and assess emerging issues and potential legal risks, to encourage dialogue and establish a reporting protocol, to help coordinate responses when necessary, to provide direction for the appropriate handling of significant legal matters, and to manage legal risks as they materialize.


PROCEDURES

1. Legal Risk Officer

The department must designate a legal risk officer. The legal risk officer must maintain systematic processes for regularly and continually identifying and assessing relevant legal risks associated with current operational activities of the department.

The legal risk officer must work closely with the department's designated litigation coordinator to, among other things, update, distribute, collect, and carefully analyze risk reports covering topics such as litigation that is significant or has potential to have significant liability to LARA; subpoenas; FOIA requests; permanent and emergency rulemaking; AG Opinion requests, and division-level AG advice.

The legal risk officer must establish clear and consistent communication channels to ensure that relevant information regarding legal risk is promptly delivered to the department director and appropriate department executive office officials.

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2. **Litigation**

For purposes of these procedures, litigation means any administrative, civil, or criminal action in which a party named in the litigation is the department; any LARA agency, bureau, or commission; or any LARA employee who was acting within the scope of his or her employment.

- a. **Litigation Document Handling.** An agency, bureau, or commission director is responsible for submitting to the AG, for representation, legal documents received including, but not limited to, summons and complaints, subpoenas, first interrogatories for any litigation in which a named party is the department; a LARA agency, bureau, or commission; or LARA employee. Legal documents received in the department's executive office must immediately be forwarded to the appropriate agency, bureau, or commission director for handling.
- b. **Litigation Holds.** Litigation holds are addressed in the department's "Litigation Hold Flowchart" which includes the authority and process for initiating, implementing, monitoring, and releasing a litigation hold (Attachment #1).
- c. **Employee Request for AG Representation.** Any department, agency, bureau, or commission employee request for AG representation – seeking representation for a matter that occurred within the scope of the employee's employment that names the employee as an individual defendant – must be submitted to the appropriate deputy director and legal risk officer. The appropriate deputy director and legal risk officer must process the employee request for AG representation in a manner consistent with Civil Service Commission Rule 2-19 "Legal Representation." This paragraph does not apply to any other AG representation request, including those routine to the duties of an agency, bureau, or commission.

3. **Significant Litigation**

For purposes of these procedures, significant litigation means any litigation as defined in section 2 that contains one or more of the following attributes:

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- a. **Potential for Significant Financial Exposure.** Any litigation that has the potential of resulting in financial exposure in excess of \$200,000.
- b. **Potential for Precedential Impact.** Any litigation, in the opinion of the AG or the agency, bureau, or commission director, that may cause a precedential impact including, but not limited to, impact on the operations, powers, or enforcement posture of the department, agency, bureau or commission; impact on or potential changes with the application or meaning of an applicable administrative rule, state statute, or state constitution; impact on or potential impact on a legacy case where the department director might disagree with the current litigation position, or any litigation resolution or settlement which may require a new appropriation.
- c. **Potential for High Profile Controversy.** Any litigation, in the opinion of the AG or the agency, bureau, or commission director, that may result in any media or legislative attention, be perceived as controversial, or result in criticism to the department, agency, bureau, or commission.
- d. **Emerging Issues.** Any emerging issues, including any administrative or regulatory action taken by the department, or any LARA agency, bureau, or commission that will likely result in significant litigation, controversy, or media or legislative attention.

4. **Significant Litigation Report**

As soon as practicable after it becomes evident, significant litigation, as defined above in paragraph 3, must be reported by the agency, bureau, or commission director to the appropriate deputy director and legal risk officer.

In addition to the initial reporting as described above, a significant litigation report, in a format prescribed by the legal risk officer, must be submitted monthly, by the agency, bureau, or commission director to the legal risk officer by the first of each month.

The legal risk officer is responsible for compiling, analyzing, and maintaining the information contained in the significant litigation report, and when appropriate must communicate relevant information to the department director and appropriate department executive office officials.

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5. **Subpoenas and FOIA requests**

Every subpoena must be carefully inspected to determine the scope, subject, and addressee. Any subpoena directed to the department or multiple agencies within the department must be immediately forwarded to the department's litigation coordinator, with a copy sent to the department's legal risk officer. The department's litigation coordinator will coordinate responses to such subpoenas on behalf of the department. Except as noted below, subpoenas directed to a specific agency (not multiple agencies or the department generally) may be processed by that agency directly without forwarding to the department's litigation coordinator and legal risk officer. The department's litigation coordinator may also delegate the responses for certain subpoenas to an agency.


As soon as practicable after it becomes evident, any subpoena or FOIA request received that will likely result in media or legislative attention, concern a matter that is especially sensitive, or will likely result in disclosure of communications from the department's executive office or the executive office of the Governor, must be immediately reported by the agency, bureau, or commission director to the appropriate deputy director and legal risk officer.

6. **Permanent Rulemaking**

As soon as practicable after it becomes evident, an agency, bureau, or commission director must notify the appropriate deputy director and legal risk officer of any permanent rulemaking that may cause media or legislative attention, be perceived as controversial, or result in criticism to the department, agency, bureau, or commission, or concern a matter that is especially sensitive.

7. **Emergency Rulemaking**

Before the drafting of emergency rules begin, an agency, bureau, or commission director must notify and consult with the appropriate deputy director and legal risk officer of any emerging issue that may potentially justify the need for establishing emergency rules.


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8. **AG Opinion and Advice**

- a. **Formal AG Opinion Requests.** For purposes of these procedures, a formal AG Opinion request is a request for a written, published AG Opinion. A request for a formal AG opinion must only be submitted by the Department Director, or by an individual designated by the Director. Before a formal AG Opinion request is submitted to the AG, a LARA agency, bureau, or commission may be asked to submit a draft of the request to the appropriate deputy director and legal risk officer for review and approval or may be asked to review a draft of a request. If the request is approved, the appropriate deputy director and legal risk officer must coordinate obtaining the approval and signature of the Director or the individual designated by the Director.
- b. **Division-level AG Advice.** For purposes of these procedures, division-level AG advice is a request for a non-published, written AG opinion. Division-level AG advice is typically delivered by memorandum and identified as “division-level advice.”

Before requesting division-level advice, a LARA agency, bureau, or commission director must notify the appropriate deputy director and legal risk officer if the request contains one or more of the following attributes:

- i. The department’s executive office or the executive office of the governor has a leading role or is, or likely will be, substantially involved in the matter;
- ii. The advice could address the scope of the department director’s or the Governor’s powers;
- iii. The matter is especially sensitive or controversial with external stakeholders such as the media, trade associations, the legislature, or if there is any pending litigation or legislation concerning the subject matter of the potential advice;
- iv. The matter is especially important, and the agency, bureau, or commission wants the appropriate deputy director and legal risk officer to be aware of, and perhaps assist with, the request.

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9. AG Memoranda of Understanding (MOU)

Any proposed MOU between an agency, bureau, or commission and the AG must first be submitted by the agency, bureau, or commission director to the appropriate deputy director and legal risk officer for review. If approved by the appropriate deputy director and legal risk officer to proceed, the MOU must then be processed through the department's Financial and Administrative Services office.

10. Other Sensitive Matters

Any other sensitive matter not described in these procedures must be reported by the agency, bureau, or commission director to the appropriate deputy director and legal risk officer, as soon as practicable after it becomes evident, that the matter may cause media or legislative attention, be perceived as controversial, or result in criticism to the department, agency, bureau, or commission.

ATTACHEMENT 1

Litigation Hold Flow Chart

LARA or Attorney General staff identifies a matter where litigation has commenced or is “reasonably anticipated or foreseeable.” If LARA staff identifies such a matter, they will immediately report it to LARA’s Litigation Coordinator (“LC”) and Legal Risk Officer (“LRO”), who will consult with Attorney General staff to confirm that a litigation hold is necessary. **Upon confirmation, all retention and disposal schedules pertaining to potential evidence are suspended.**

Attorney General Staff sends litigation hold requesting preservation of electronically stored information and other potential evidence, including that stored upon mobile devices, to the LC, LRO, and the appropriate Bureau Director.

LC notifies potential custodians within the appropriate Bureau of the requirement to preserve all potential evidence that may be responsive to the litigation hold. When appropriate, LC disseminates the litigation hold to the appropriate Bureau staff and asks known custodians to identify any other potential custodians.

Attorney General Staff sends Form 244 to the LC to complete. LC completes Form 244, by providing a list of potential custodians (i.e., persons, who at the time the litigation hold is issued, are in possession of potentially responsive information), and returns it to Attorney General Staff. Attorney General Staff will work with DTMB as needed to implement the hold.

LC provides custodians with agreed upon search terms to be utilized by custodians to identify and produce evidence that may be potentially responsive to the subpoena or discovery request.

Upon receipt of subpoena or other discovery request to produce evidence, LC notifies Attorney General Staff (unless LARA authorized Attorney General Staff to accept service). Attorney General Staff, and/or DTMB Staff develop agreed upon search parameters (i.e., relevant words, or phrases, or both).

Upon authorization by LC, Attorney General Staff directs DTMB staff to search custodians’ computers to identify and collect electronically stored information that may be potentially responsive to the subpoena or discovery request.

All paper documents are compiled in one location, reviewed for responsiveness and duplication, and provided to Attorney General Staff by LC.

Attorney General Staff receives all potential evidence by specified date and in agreed upon format.

Custodians’ electronically stored information is provided to Attorney General Staff by DTMB staff which maintains ongoing access to custodians’ accounts.

Upon determination that litigation hold may be released, Attorney General Staff reissues Form 244 to LC to effectuate release of the litigation hold and cancel DTMB staff ongoing access to custodians’ electronic accounts.

LC notifies the appropriate Bureau and staff of the release of litigation hold and to retain or dispose of documents in accord with applicable retention schedules, unless documents are subject to a separate litigation hold still in effect.